

IN THE HIGH COURT OF BOMBAY AT PANAJI

Appeal from Order Nos.18/2016 & 19/2016

Appeal from Order No.18/2016

Mr. Aubrey D'Souza,
Aged 73 years of age,
Son of late John D'Souza,
Businessman, holding
PAN CARD No.ABWPD4826E,
Residing at H.No.E-90, Tivai vaddo,
Calangute.

... **Appellant**
Original Defendant

Versus

Adarsh Hospitalities
and Resorts Private Ltd.,
Company incorporated under the
Companies act, having its office
at 359/SECTOR-40-A, Chandigarh,
Holder of PAN No.AAICA8473A
Through Director, Mr. Vijay Pal Singh.

.. **Respondent**
Original Plaintiff

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Shri Joseph Vaz, Advocate for the appellant.
Shri Rohit Bras De Sa, Advocate for respondent.

CORAM: PRITHVIRAJ K.CHAVAN, J.
RESERVED ON : 11.09.2017
PRONOUNCED ON :20.09.2017

JUDGMENT :

1. Admit. Heard finally with the consent of the parties.
2. These two appeals are being disposed of by a common order since these arose out of the impugned common order passed by the learned Adhoc Senior Civil Judge, Mapusa, on 20.1.2016 by which, she had granted temporary injunction, *inter alia* directing the respondent to pay arrears of monthly compensation to the appellant within a period of six months and further to pay regular monthly compensation.
3. The parties shall be referred to as "plaintiff" and "defendant" for the sake of convenience.
4. Shorn of unnecessary details, a few facts germane for disposal of these two appeals, can be summarised as follows:

The plaintiff is a Private Limited Company incorporated under the Companies Act having its registered office, as shown in the cause title of the plaint. The plaintiff and the defendant

entered into two Lease Deeds dated 24.5.2012, which are registered at Sr. Nos.286/2012 and 287/2012 in the office of the Sub Registrar, Mapusa by which, the properties described in the plaint have been granted on lease to the plaintiff by the defendant on annual rent of Rs.58,60,896/- and Rs.41,32,100/- respectively. The defendant claims to be an owner of the suit property, which comprises residential building, identified as (a) Building No. 6 bearing House Nos.355/1/6/GF/1, 355/1-5/FF/2, 355/1-6/SF/3 and 355/1-6/TF/4 comprising of ground plus three upper floors converted to 14 rooms (b) building no.7 bearing House No.355/1-7/GF/1, 355/1-7/SF/3 and 355/1-7/TF/4 comprising of ground plus three upper floors converted into 14 rooms, (c) Building No.8 bearing House No.355/1-/GF/1, 355/1-8/FF/2 and 355/1-8/SF/3 and 355/1-8/TF/4, converted to 15 rooms alongwith a swimming pool land lawns in survey no.278/1 of village Candolim situated at Candolim and (ii) a part of the bungalow bearing H.No.313 comprising of ground floor alongwith lawn around in survey no.27/7 of village Candolim, situated at Candolim within the limits of the village Panchayat of Candolim.

5. There is a stipulation in the Lease Deed that the work of repairs and renovation would incur an approximate cost of Rs.1,00,00,000/- which was to be borne by the plaintiff. The plaintiff, however, contends that the cost of repairs and

renovation exceeded to the tune of Rs.2,27,81,216/- which has been duly acknowledged by the defendant. It was also agreed upon between the parties as per Lease Deed that the plaintiff would compensate the defendant with an amount of Rs.5,00,000/- per month towards rent for the first year and second year by deducting an amount incurred for renovation. For the third year, the rent shall be Rs.5,50,000/- for the fourth year it would be Rs.6,00,000/- and for the fifth and last year, it would be Rs.6,50,000/-. There would be no deduction for the fifth year. These terms have been incorporated in Clause 3 of the Lease Deed. An amount of Rs.15,00,000/- has been granted to the defendant-lessor by the plaintiff which was to be repaid to the plaintiff on termination of the Lease Deed and thereafter handing over vacant possession of the demise premises to the defendant. There is one more clause in the Lease Deed i.e. the plaintiff would have a right of pre-emption in the event of the defendant-lessor intends to sale the suit premises/restaurants, which would be excluding the part of bungalow bearing no.313 and Lawn at Survey no.27/6 at Candolim. Admittedly, the lease period was of five years ending on 31.5.2017, which may be subsequently renewed at the option of lessee, on such terms and conditions mutually agreed between the parties.

6. It is the contention of the plaintiff that he has incurred

expenses and spent huge amount for the purpose of facilitating and obtaining permissions from different Government Authorities. Having done so, the plaintiff started hotel and restaurant operations in the demised premises and has engaged about 60 employees, for the purpose of running his business. The plaintiff had also deposited Rs.30,00,000/- towards security as an interest free loan with the lessor.

7. As the defendant has proposed to sell the suit property, in view of the public notice dated 7.3.2013 and pursuant to a legal notice dated 20.2.2013 received by the plaintiff, it is contended that the defendant has violated the terms of lease agreement and, therefore, he is required to be restrained from creating the third party interest in respect of the suit property.

8. On the other hand, the defendant in written statement as well as the counter claim contended that the lease/licence was for conducting the business for a period of five years commencing from 1.4.2012 for commercial purpose of running resorts. It had permitted the plaintiff to enter upon the premises for the purpose of renovation with immediate effect with rent free period of two months with effect from 1.4.2012 to 31.5.2012. The plaintiff agreed to carry the renovation for approximate costs of Rs.1,00,00,000/- from its own funds and the amount spent for

renovation would be recovered from the amount of installment with simple interest @ 9% per annum. That means, the amount spent on renovation would be deducted from the monthly installment. According to the defendant, Lease Deed dated 24.5.2012 is in respect of Sunshine Park Resort, which has 43 Apartments, 8 Pagodas and restaurants-cum-dining area. The Lease Deed in respect Sun Royal Resort consisting of 43 rooms, earlier permission was given for management to the Sterling Resorts of Chennai till 31.3.2014. These rooms are situated in a different buildings. It is contended that though the part of the bungalow bearing No.313, as mentioned in the schedule, the same is not the subject matter of the lease/licence and it was only given to the plaintiff to use the part of it as a kitchen and restaurant. The defendant also took a stand that though the deed dated 24.5.2012 is under the nomenclature as a Deed of Lease is actually a Leave and Licence Agreement, which is in the nature of management agreement for Sunshine Park Resort and Sterling Resort. The possession of the plaintiff under the said Deed is only permissible possession, subject to the plaintiff paying regularly monthly compensation for the use of the said property. The plaintiff has failed to pay or to show his willingness to pay the compensation and, therefore, he cannot claim right without duties to be performed. The defendant has, therefore, claimed injunction against the plaintiff.

9. The learned trial Court, by the impugned order after hearing the respective sides, restrained the defendant from interfering with possession of the suit property, which is in possession of the plaintiff, *inter alia* directing the plaintiff to clear arrears of monthly compensation within six months.

10. Heard Shri Vaz, learned counsel appearing for the appellant and Shri Rohit Bras De Sa, learned counsel appearing for the respondent.

11. The learned counsel appearing for the appellant/defendant submits that the period of lease has already been expired. The appellant is 74 years of age. The respondent has not paid a single paise, though an amount of Rs. 6,00,00,000/- is due to him and thereby breached the directions issued by the Court in the impugned orders. It is also the submission of Shri Vaz, learned counsel for the appellant/defendant that if it is the contention of the respondent that he had spent around Rs.2,00,00,000/- over the suit property, let the respondent deposit at least Rs.4,00,00,000/- in the Court. He took me through the Deed of Lease dated 24.5.2012 and its recitals as well as notice of termination dated 28.2.2013. At the outset, it is pertinent to note that the so-called Lease Deed dated 24.5.2012 is a document, which is quite ambiguous in the sense that it

connotes both lease as well as leave and licence agreement from which, it is difficult, at this stage, to construe whether the parties intended an agreement of lease or it was simply an agreement of leave and licence. Page 4 of the said Deed indicates that the suit properties were given on a lease of five years for commercial purpose commencing from 1.4.2012 and terminating on 31.5.2017. Clause 17 of the said deed further stipulates that in the event the lessor propose to sell the demised premises and the restaurant then the first preference would be to the lessee/respondent on terms and conditions and the consideration to be agreed at the relevant time; whereas it is the contention of the appellant that the part of the bungalow bearing No.313, as mentioned in the schedule, is not the subject matter of the lease or licence but it was given to the plaintiff only to use a part of it as "Kitchen". It is further contended that the deed dated 24.5.2012 though is under nomenclature as a deed of lease is actually agreement of leave and licence. In such peculiar circumstances, it is only during adjudication the real intention of the parties could be gathered. It appears that the respondent though in possession of the suit premises has not cleared the arrears of the monthly compensation as directed by the impugned orders for which the appellant appears to have moved the trial Court by filing an application under Order XXXIX Rule 2, 2A, 4, 9 and Order XL Rule 1 (a), (b) and (c) read with

Section 151 of the Code of Civil Procedure. This fact is brought to the notice of this Court by the learned counsel for the respondent and not by the appellant, who principally should have brought this fact to the notice of this Court. It is as if the appellant is trying to seek simultaneous remedies from two different Courts.

12. It is pertinent to note that it is the respondent, who has filed suit against the appellant and not otherwise. It appears that the appellant did not demand any money outstanding against the respondent for two years. It is only after the suit filed by the plaintiff, the defendant/appellant appears to have filed a counter claim. It is pertinent to note that parties are litigating on the basis of ambiguous nature of deed. It is well settled that the merits are not required gone into while deciding the application for temporary injunction under Order XLIII Rule 1 R of the Code of Civil Procedure. The said ambiguity can be resolved only during a trial.

13. The learned counsel for the appellant has relied upon a few case laws. In case of **Robust Hotels Private Limited and others Vs. Eih Limited and others** reported in **(2017)1 SCC 622**, it is held that it is not open to parties to the litigation or to any third party to determine validity of an order passed by Court. The parties who consider an order passed by a court as voidable

or non est, must approach the Court of competent jurisdiction to have the said order set aside on such grounds as available in law. It is held that the order of the Court has to be complied with the sale in violation of the said order has to be set aside. There is no doubt that the order passed by the Court must be obeyed and there should not be any breach of the order unless that order is set aside by the Competent Court. This has also been observed by the High Court of Himachal Pradesh in case of **Jagdev Singh and another Vs. Subhash Chand and another** reported in **(2015 0 Supreme (HP) 847)**. It is observed by the learned Single Judge of Himachal Pradesh High Court, in paragraph 6 reads thus:

"6 All Courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their Constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid aliique, concedit, concediture et id sine quo res ipsa esse non potest (when the law gives a person anything, it gives him that also without which the thing itself cannot exist.)".

14. It is equally important to note that the plaintiff by virtue of the deed dated 24.5.2012 is in settled possession and, therefore, he cannot be dispossessed without following the due course of law. It is not the case of the defendant that the plaintiff is a trespasser. The learned counsel appearing for the plaintiff

has placed reliance on a case law reported in **Rame Gowda (Dead) by LRS. Vs. M. Varadappa Naidu (Dead) by LRs. and another**, reported in **(2004) 1 SCC 769** defined what is, "settled possession". Paragraphs nos.7, 8 and 9 of the judgment can be quoted for advantage, which read thus:-

"7. The thought has prevailed incessantly, till date, the last and latest one in the chain of decisions being Ramesh Chand Ardawatiya Vs. Anil Panjwani (2003) 7 SCC 350. In-between, to quote a few out of severals, in Lallu Yeshwant Singh (dead) by his legal representative Vs. Rao Jagdish Singh and others (1968) 2 SCR 203, this Court has held that a landlord did commit trespass when he forcibly entered his own land in the possession of a tenant whose tenancy has expired. The Court turned down the submission that under the general law applicable to a lessor and a lessee there was no rule or principle which made it obligatory for the lessor to resort to Court and obtain an order for possession before he could eject the lessee. The court quoted with approval the law as stated by a Full Bench of Allahabad High Court in Yar Mohammad Vs. Lakshmi Das (AIR 1959 All. 1,4), "Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause." In the oft-quoted case of Nair Service Society Ltd. Vs. K.C. Alexander and Ors. (1968) 3 SCR 163, this Court held that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good

title against all the world but the rightful owner. When the facts disclose no title in either party, possession alone decides. The court quoted Loft's maxim 'Possessio contra omnes valet praeter eum cuius sit possessionis (He that hath possession hath right against all but him that hath the very right)' and said, "A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to the plaintiff's and thus be able to raise a presumption prior in time". In *M.C. Chockalingam and Ors. Vs. V. Manickavasagam and Ors.* (1974) 1 SCC 48, this Court held that the law forbids forcible dispossession, even with the best of title. In *Krishna Ram Mahale (dead) by his Lrs. Vs. Mrs. Shobha Venkat Rao* (1989) 4 SCC 131, it was held that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. In *Nagar Palika, Jind Vs. Jagat Singh, Advocate* (1995) 3 SCC 426, this Court held that disputed questions of title are to be decided by due process of law, but the peaceful possession is to be protected from the trespasser without regard to the question of the origin of the possession. When the defendant fails in proving his title to the suit land the plaintiff can succeed in securing a decree for possession on the basis of his prior possession against the defendant who has dispossessed him. Such a suit will be founded on the averment of previous possession of the plaintiff and dispossession by the defendant.

8. It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is

entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

9. *It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession*

and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to Munshi Ram and Ors. Vs. Delhi Administration (1968) 2 SCR 455, Puran Singh and Ors. Vs. The State of Punjab (1975) 4 SCC 518 and Ram Rattan and Ors. Vs. State of Uttar Pradesh (1977) 1 SCC 188. The authorities need not be multiplied. In Munshi Ram & Ors.'s case (supra), it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh and Ors.'s case (supra), the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed,

and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' :

i) that the trespasser must be in actual physical possession of the property over a sufficiently long period; ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case; iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession”.

15. The learned counsel has also relied on a judgment of the Supreme Court in a case of **Wander Ltd. and another Vs. Antox India P.Ltd.** reported in **1990 Supp SCC 727**. The

ratio of this judgment is on the point that the Appellate Court will not interfere in the discretion used by the trial Court if it is properly exercised and is not arbitrary, capricious or perverse.

Paragraph 13 and 14 of the said judgment read thus:

"13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on own important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged user of the Trade-Mark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material

and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in [Printers \(Mysore\) Private Ltd. v. Pothan Joseph](#) :

... These principles are well established, but as has been observed by Viscount Simon in Charles Oseption & Co. v. Johnston the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case”.

In view of the aforesaid principle laid down by the Hon'ble Supreme Court and the facts of the case in hand no interference is warranted in the impugned orders.

16. In view of the aforesaid facts and circumstances, more particularly, in the light of the fact that the defendant, who has already moved an application under Order XXXIX Rules 2, 2-A, 4, 9 of Order XL Rule 1 (a) (b) (c) read with Section 151 of the CPC, these appeals need to be disposed of with a direction to the trial Court to expeditiously decide the said applications without getting influenced with the observations made herein above by this Court. The parties shall co-operate with the trial Court in expeditiously deciding the said applications.

17. In view of the aforesaid observations, both the appeals stand disposed of, with no order as to costs.

PRITHVIRAJ K. CHAVAN, J.

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